IN THE IOWA DISTRICT COURT FOR POLK COUNTY

DOUGLAS DAYSTROM, Petitioner, v. PUBLIC EMPLOYMENT RELATIONS BOARD, Respondent and IOWA UNITED PROFESSIONALS, Intervenor.	AA No. 2676 RULING ON PETITION FOR JUDICIAL REVIEW

A hearing was held on March 8, 1996 on Petitioner's Petition for Judicial Review of the Public Employment Relations Board's (PERB) decision dismissing Petitioner Douglas Daystrom's (Daystrom), complaint. Daystrom represented himself, Respondent PERB was represented by its attorney, Diane Tvrdik, and Intervenor, Iowa United Professionals (IUP), was represented by its attorney, Matthew Glassor. The Court, having reviewed the Petition and Answer, the briefs submitted by counsel, having heard the arguments of counsel and otherwise being advised in the premises, enters the following ruling.

RULING

I. ISSUE

Whether the PERB erred in affirming the Administrative Law Judge's finding that IUP did not violate the Public Employees Relations Act (Iowa Code Chapter 20) by acting in an arbitrary, discriminatory, or bad faith manner.

II. STANDARD OF REVIEW

Judicial review of the actions of an administrative agency is governed by the standards of Iowa Code section 17A.19. *Mercy Health Center v. State Health Facilities Council*, 360 N.W. 2d 808, 811 (Iowa 1985). The court acts in an appellate capacity by reviewing the agency's decision solely to correct any errors of law. *Dubuque Community Sch. Dist. v. Public Employment Relations Bd.*, 424 N.W.2d 427, 430 (Iowa 1988). Nearly all disputes in the scope of administrative law are won or lost at the agency level. *Iowa-Illinois Gas & Electric Co. v. Iowa State Commerce Commission*, 412 N.W.2d 600, 604 (Iowa 1987).

The cardinal rule of administrative law is that judgment calls are the province of the administrative tribunal and not of the courts. *Mercy*, 360 N.W.2d at 809. The agency's decision is final if it is supported by substantial evidence and is correct in its conclusions of law. *Heatherly v. Iowa Dept. Of Job Service*, 397 N.W.2d 670, 670 (Iowa 1987). The agency's decision is supported by substantial evidence in the record when a reasonable mind would accept the record viewed as a whole as adequate to reach the conclusion. *See Alcoa v. Employment Appeal Board.*, 449 N.W.2d 391, 394 (Iowa 1989).

The possibility of drawing two inconsistent conclusions from the same evidence does not prevent the agency's decision from being supported by substantial evidence. *Henry v. Iowa Dept. Of Job Service*, 391 N.W.2d 731, 734 (Iowa 1986). The court must not reassess the weight to be accorded to evidence; assessing the weight is within the exclusive domain of the agency. *Burns v. Board of Nursing*, 495 N.W.2d 689, 699 (Iowa 1993).

A court may reverse an agency action that is affected by error of law. Iowa Code §17A.19(8)(e)(1995). When deciding whether an agency made an error of law, the court gives

weight to the agency's construction of a statute, but is not bound by this construction *Super Valu Stores v. Department of Revenue*, 479 N.W.2d 255, 258 (Iowa 1991). It is ultimately the duty of the court to determine matters of law including the interpretation of a statute or an agency rule interpreting a statute *Hollinrake v. Law Enforcement Acad.*, 452 N.W. 2d 598, 601 (Iowa 1990)

III. STATEMENT OF FACTS

The parties agree that little factual dispute exists. Prior to June 21, 1990, Daystrom was employed by the State's Department of Human Services (DHS) as a Social Worker 3 (SW3). In this capacity, Daystrom worked as a Child Protective Investigator (CPI). The SW3 classification was included in a bargaining unit represented for the purpose of collective bargaining by IUP. A collective bargaining agreement between the State and IUP was in effect from July 1, 1989 through June 30, 1991. Article IV, Section 10 of the agreement provides the State may not discipline an employee without just cause

On June 21, 1990, Daystrom was discharged from employment with the State pursuant to a letter from District Administrator William Ketch (Ketch). The letter of termination provided three reasons for termination: 1) Daystrom's submission of an untrue and inaccurate mileage claim in March of 1990, 2) Daystrom's conviction of assault against his ex-wife, and 3) substandard performance. The letter also indicated that the discharge was grievable under the State/IUP collective bargaining agreement

On June 22, 1990, Daystrom filed a grievance pursuant to the collective bargaining agreement, alleging that his discharge was not based on just cause. Pursuant to the bargaining agreement, discharge grievances commence at Step 3 of the contractual grievance procedure.

A Step 3 grievance decision was issued by Beverly Allen (Allen), a representative of the Iowa

Department of Personnel (IDOP) dated October 25, 1990. The Step 3 decision apparently contained some information relating to a grievant other than Daystrom, including a reference to a termination date of April 19, 1990. The decision correctly noted, however, some of the reasons for Daystrom's termination, including misrepresentation of mileage claims, insubordination, and the assault conviction. The Step 3 decision denied Daystrom's grievance.

On November 7, 1990, Jim Shannon (Shannon), an IUP consultant, appealed Daystrom's grievance to Step 4 arbitration of the collective bargaining agreement. Shannon's letter of appeal was sent to Linda Hanson (Hanson), who was chief counsel of the Employment Law/Labor Relations Bureau of IDOP.

On November 9, 1990, Hanson sent a letter to Shannon indicating that Daystrom's grievance had been answered on September 25, 1990, and that Shannon's appeal of Daystrom's grievance to arbitration was violative of a fifteen-day contractual time limit for appeal to arbitration following a Step 3 response. Hanson's letter asserted that the appeal was untimely, ineligible for arbitration, and the grievance was considered terminated on the basis of the Step 3 answer.

Sometime thereafter, Hanson became aware that she had erroneously used September 25, 1990, in place of the actual date of October 25, 1990, as the date of issuance of the Step 3 decision. While IDOP thereafter considered Daystrom's appeal to be timely and treated it as such, there was no documentation to correct Hanson's erroneous letter of November 9, 1990.

IUP President Mike Maddigan (Maddigan) and IDOP attorney Mike Elliot (Elliot) discussed the arbitration of Daystrom's grievance and the arbitration of the other CPI's that had been terminated. Elliott verbally agreed to extend the time lines for hearing Daystrom's grievance so the other two CPI termination grievances could be arbitrated first. This agreement to extend time lines

was never reduced to writing

Early in 1991 after Maddigan learned that Daystrom had been arrested at work for violation of a no-contact order Maddigan directed IUP Staff Representative James Paprocki (Paprocki) to investigate Daystrom s criminal charges and convictions Paprocki provided Maddigan with a written report of his investigation dated March 12 1991 which included references to fines jail time and a no-contact order between Daystrom and his ex-wife

On March 25 1991 Maddigan sent a letter to Daystrom informing him that the Stewards and Arbitration Committee (SAC) would reopen consideration of the decision to arbitrate Daystrom's grievance This reconsideration would transpire at the next SAC meeting scheduled for May 18 1991

On March 26 1991 Linda Cline (Cline) IUP Secretary, at Maddigan s direction sent a letter to IUP's attorney Glasson seeking a written opinion on the merits of arbitrating several cases including Daystrom s grievance Attached to the letter was a copy of the Step 3 decision by Allen and a copy of the report from Paprocki

On May 2 1991 Maddigan sent the agenda for the May 18 SAC meeting to the SAC members Included with the agenda were the letter of notification to Daystrom and Paprocki s report

On May 3 1991 Glasson sent his response to IUP s request for a written opinion regarding the advisability of arbitrating Daystrom s grievance In his three-page analysis and discussion Glasson addressed the allegations against Daystrom that he had submitted a false mileage claim had been insubordinate in destroying the claim and had been convicted of assaulting his ex-wife Glasson also provided discussion of the highe standard of conduct that child abuse investigators seemed to

be held as expressed by an arbitrator in an earlier case Glasson wrote

> In summary I believe that at least two of the three grounds alleged by management appear to raise substantial obstacle to the union being successful in arbitration I am not sure of the third simply because I do not have enough facts I would say that management has a good chance of success on any of these three grounds and taken in combination I would predict that the union's chance of success is very slim My recommendation would be not to arbitrate this case I believe that it would be very complex and time consuming and offers very little chance of success I also believe that arbitrating a case like this could be very damaging to the union's credibility and might have a negative impact on other employees who are discharged for less substantial reasons

This letter was forwarded to SAC members on May 6 1991

On May 18 1991 the SAC met as scheduled Daystrom was present for this meeting Minutes from the meeting reflect Daystrom's defense of his actions by asserting that there had been no obvious failure to protect victims that only one mileage claim was in question that his jail time had included 30 days for harassment 20 days for assault and 20 days for failure to pay child support The minutes also reflect that Daystrom had been arrested on the job for violation of a no-contact order with his ex-wife

Daystrom asked the SAC if he could submit additional data before the committee made a final decision The SAC tabled the decision on whether to arbitrate Daystrom's grievance until the material was submitted and distributed to the committee members The SAC would then be polled by telephone to vote for or against arbitration of Daystrom's grievance

On May 22 1991 Daystrom met with Glasson to express his concerns about inaccuracies in Allen's Step 3 decision and the apparent incorporation of material from another CPI's discharge into the Daystrom decision Daystrom also attacked inaccuracies in Paprocki's report to Maddigan In a letter to the SAC members dated May 22 1991 Daystrom admitted that he had been arrested for

assaulting his ex-wife but argued there were extenuating circumstances He further indicated that Glasson would provide a new opinion and recommendation to the SAC

In a letter to the SAC dated May 28 1991 Glasson somewhat softened his view regarding the merits of arbitrating Davstrom s grievance While Glasson identified inaccuracies in Allen s Step s decision which appeared to be taken from another employee s Step 3 decision by Allen Glasson focused his analysis on the grounds for discharge alleged in the termination letter rather than the flawed Step 3 decision by Allen Glasson suggested that if the termination had been based solely on the mileage claim he would recommend arbitration but that Davstrom s conviction for assault on his ex-wife was more troubling In the intervening period between Glasson s recommendations a second arbitration decision had been received which supported the concept that CPI s could be held to a higher standard of conduct than other employees Glasson concluded

> In summary I think that the chances of winning this grievance are fairly slim They are somewhat better than I suggested in my earlier letter but still not very good primarily because of the charges of violence and abusive behavior I would be willing to arbitrate this grievance (it wouldn t be the first time we have taken on a lost cause) but I would not recommend it

By May 28 1991 the information provided by Davstrom and Glasson s second analysis and recommendation were distributed to the SAC members The chair of the SAC Beth Cox (Cox) was responsible for conducting the polling of the SAC members Cox conducted the poll by telephone over the first several days of June 1991 and the result was a decision not to arbitrate Davstrom s grievance SAC member Dan Kelley testified that his decision to vote against arbitration was based primarily on his belief that the chances of prevailing at arbitration were slim particularly in light of the prior arbitration decisions suggesting that CPI s would be held to a higher standard of conduct than other employees Cox likewise testified that the committee s decision not to arbitrate the case

was based on its evaluation of the merits of the case

Daystrom was informed of the SAC s decision not to arbitrate his grievance and of his right to appeal this decision to the IUP Board Daystrom chose to exercise his appeal rights

On October 17 1991, Cline sent a letter to Hanson requesting that Daystrom's grievance be scheduled for arbitration IUP deemed this request to be prudent since it did not have a written extension of time lines from the State and since a final decision had not been made by the IUP Board on the status of Daystrom's grievance IUP also deemed this request for scheduling as adequate to meet the following contractual requirement

> In order to be considered timely the Union must schedule grievances which are appealed to arbitration, via the Director of the Department of Personnel, for hearing no later than 365 days from the date the grievance was appealed to arbitration

IUP has always interpreted this provision to mean that a request for sc: :duling of arbitration must be scheduled within 365 days and the State has never argued otherwise in any prior IUP grievances Hanson testified that timeliness would not have been raised as an issue in the Daystrom grievance in any event since it was her understanding that the parties had verbally agreed to extend the time lines

The IUP Board met on November 16 1991 Daystrom was allowed to present to the IUP Board his arguments in favor of arbitrating his grievance An excerpt from the minutes of that meeting indicates that a motion was made to uphold the SAC decision and the motion carried

On November 18 1991 Cline sent a letter to IDOP withdrawing Daystrom's grievance from futher consideration for arbitration Daystrom filed his prohibited practice complaint with PERB on January 29, 1992 After a hearing, the ALJ determined that IUP has not violated the Public Employment Relations Act and proposed that Daystrom's complaint be dismissed On appeal by

Daystrom PERB found that Daystrom had failed to meet his burden of proving that IUP failed to represent him and it dismissed the complaint on November 14 1995 Daystrom has appealed that ruling to this Court

IV DISCUSSION

Review of PERB decisions is governed by Iowa Code section 17A 19(8) which mandates relief be granted only if the agency action was ' unreasonable, arbitrary or capricious " *Allen v State of Iowa Dept of Personnel* 528 N W 2d 583, 587 (Iowa 1995) Arbitrary and capricious agency action is taken without regard to the law or without consideration of the facts of the case *Office of Consumer Advocate v Iowa Commerce Comm* 432 N W 2d 148, 154 (Iowa 1988) For agency action to be considered abuse of discretion it must be unreasonable and lack rationality *Trank v Iowa Dept of Transportation*, 386 N W 2d 86 87 (Iowa 1986) An agency decision supported by substantial evidence in the record as a whole must be upheld Iowa Code § 17A 19(8)(f) Thus, this Court does not review the evidence in order to make a decision, but looks at the record only to determine if PERB acted in an unreasonable arbitrary, or capricious manner and that its decision is supported by substantial evidence

Daystrom seems to argue[1] that the AI J and PERB erred in failing to consider or give greater weight to evidence indicating that Daystrom would have prevailed in arbitration had the IUP pursued its grievance on his behalf or presented evidence indicating that the State lacked just cause for his termination As explained above, this Court is limited in its review to determining whether the agency decision is supported by substantial evidence as a whole It is not within the Court's province to

[1] Daystrom is acting *pro se* and the Court finds it necessary to interpret and label his arguments since they are from a layperson

reweigh the evidence

Daystrom also appears to argue that IUP breached its duty of 'fair representation" by not pursuing arbitration for his grievance IUP's activities are governed by Iowa Code Chapter 20 Section 20 17(1) requires IUP to 'be the exclusive representative of all public employees in the bargaining unit and shall represent all public employees fairly' To be successful in his claim, Daystrom was required to "establish by a preponderance of the evidence action or inaction by the organization which was arbitrary, discriminatory, or in bad faith "[2] Iowa Code § 20 17(1) PERB found that Daystrom had not met his burden This Court finds substantial evidence in the record to support PERB's decision - there was no arbitrary, discriminatory or bad faith conduct

Daystrom was allowed several opportunities to present to SAC and IUP evidence to support his argument that he was unfairly discharged Substantial evidence supports a finding that the decision not to arbitrate his grievance was based upon the individual facts of Daystrom's case There was a reasoned review of the facts of Daystrom's situation and a proper, procedural determination by IUP not to pursue his grievance further No evidence was presented to show that any of the SAC or IUP members held any personal animous toward Daystrom or that they had any improper motive

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[2] Daystrom maintains that the ALJ and PERB erred in not applying *Norton v Adair Co*, 441 N W 2d 347 (Iowa 1989) to determine whether IUP breached its duty of fair representation The *Norton* court held that the employee in that case was required to prove four elements for her fair representation claim 1) that she was a member of the bargaining unit 2) that she was discharged from employment without proper cause, 3) that she filed a grievance through her union against her employer for improper discharge, and 4) that the union acted in bad faith, or in an arbitrary, discriminatory, or perfunctory manner in handling her grievance *Id* at 356 PERB found that *Norton* was inapplicable to Daystrom's case because *Norton* involved a "hybrid" case, one against the union and the employer that was originally brought in state court Because Daystrom's case does not involve his employer and is before this Court as an administrative appeal, the Court finds that Iowa Code section 20 17(1), rather than the *Norton* test, is applicable

in voting not to arbitrate

Daystrom maintains that IUP acted arbitrarily by not taking timely action on his grievance In *Norton*, the Court ruled that the union s failure to schedule an arbitration within the three day time limit constituted a breach of the union's duty of fair representation Daystrom's grievance was required to be set for hearing within 365 days after the discharge grievance was appealed to arbitration On October 17 1991 IUP sent a letter to Hanson requesting that Daystrom's grievance be scheduled for arbitration IUP deemed this request to be prudent since it did not have a written extension of time lines from the State and since a final decision had not been made by the IUP Board on the status of Daystrom's grievance IUP also deemed this request for scheduling as IUP has always interpreted the 365 day provision to mean that a request for scheduling of arbitration must be scheduled within 365 days, and the State has never argued otherwise in any prior IUP grievances Hanson testified that timeliness would not have been raised as an issue in the Daystrom grievance in any event, since it was her understanding that the parties had verbally agreed to extend the time lines There is no showing that IUP decided not to pursue the grievance due to any time deadline Further, there has been no showing of prejudice on this point since the defense of timeliness was neither raised by the State or used as a defense to defeat Daystrom's claim Thus, substantial evidence exists for PERB's finding that IUP did not breach its fair representation duty by not scheduling the arbitration hearing within the 365 day time period

Daystrom implies that the decision in his case was discriminitory because an African-American male CPI was not discharged after being convicted of assault, while Daystom's assault conviction was one of the reasons given for his termination Clearly the cases cannot be compared as the other employee did not involve the need to file a grievance because he was not discharged Thus whether

IUP would have arbitrated his grievance is speculation Regardless, substantial evidence exists in the record to support PERB's finding that IUP's decision not to take Daystrom's grievance to arbitration was based upon the facts of his case

This Court concludes that PERB applied the proper law, Iowa Code section 20 17(1), to Daystrom's appeal from IUP In addition, substantial evidence exists for PERB's conclusion that Daystom failed to show by a preponderance of the evidence that IUP acted in an arbitrary, discriminatory, or bad faith manner IUP is vested with the power to make its own decisions and it is not the Court's province to intervene in these matters when IUP has followed appropriate procedure and has not acted in bad faith or in an arbitrary or discriminatory manner

ORDER

IT IS THE ORDER OF THE COURT that the agency action is AFFIRMED

IT IS SO ORDERED this 15th day of April, 1996

Richard G Blane II, Judge
FIFTH JUDICIAL DISTRICT OF IOWA

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